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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

UNION ELECTRIC COMPANY, *Petitioner,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF AMICI CURIAE FOR APPALACHIAN POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY POWER COMPANY, and OHIO POWER COMPANY

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## BRIEF AMICI CURIAE FOR APPALACHIAN POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY POWER COMPANY, and OHIO POWER COMPANY

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### INTEREST OF AMICI CURIAE

Amici submit this brief in support of the petitioner Union Electric Company. Both petitioner Union Electric Company and respondent Environmental Protection Agency (EPA) have consented to the filing of this brief amici curiae by letters which have been presented to the Clerk of the Court pursuant to Rule 42(2).

Appalachian Power Company, Indiana & Michigan Electric Company, Kentucky Power Company, and Ohio Power Company are each a part of the American Electric Power System, the largest privately-owned electric power system in the United States. Each of these companies was a party in one or more of the cases in the Fourth, Sixth and Seventh Circuits in which the courts held, contrary to the holding of the court of appeals below, that technological and economic factors must be considered by EPA in the approval or enforcement of implementation plans under the Clean Air Act, and that EPA's action thereon is subject to judicial review in federal courts. The decision of the Court in this case will thus have far reaching impact upon amici, and upon the extent to which they will be able to satisfy their obligation to make available within their service areas an adequate supply of electric power to the public at reasonable cost.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In its leading decision interpreting the Clean Air Act, *Train* v. *NRDC,* 421 U.S. 60 (1975), this Court held that EPA is required to approve, as a revision to a state implementation plan under Section 110(a) (3), a variance which does not interfere with Congressional goals of attaining and maintaining the national ambient air quality standards. The focus of the present case is at an earlier stage of the administrative scheme —the approval of the state implementation plan itself by the Administrator of EPA.

The Clean Air Act, 42 U.S.C. §§ 1857 *et seq.,* as amended in 1970, directs EPA to promulgate national primary and secondary standards designed to protect



against adverse effects on public health and welfare.[1] After these standards are established, each state submits to EPA a plan providing for the implementation, maintenance and enforcement of the standards within the state. The Act provides that the Administrator shall approve the plan if he determines that it satisfies the criteria enumerated in Section 110(a)(2) of the Act,[2] two of which are significant in this case. One requires the plan to provide for attainment of the primary standards "as expeditiously as practicable" but in any event no later than three years from the date of approval, and for attainment of the secondary standards within "a reasonable time."[3] The other requires the plan to contain "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance" of the standards.[4] It is the position of amici that the Administrator may and must consider economic and technological factors in making his determinations under the foregoing statutory provisions.

In its decision below[5] the Eighth Circuit dismissed on two separate but related grounds the Union Electric Company's petition for review of certain provisions of the Missouri implementation plan as approved

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[1] 42 U.S.C. § 1857c-4(a)(1) (1970).

[2] 42 U.S.C. § 1857c-5(a)(2) (1970). Once a plan is approved, it is subject to state and federal enforcement. 42 U.S.C. § 1857c-8 (1970). *See also* 42 U.S.C. § 1857c-5(d) (1970).

[3] 42 U.S.C. § 1857c-5(a)(2)(A) (1970).

[4] 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

[5] Union Electric Co. v. EPA, 515 F.2d 206 (8th Cir. 1975).

by the Administrator. First, it held that economic and technological factors may not enter into the Administrator's consideration of whether to approve a state implementation plan, and accordingly that such factors do not afford a basis for judicial review of such approval under Section 307(b) of the Act. Second, it held that a petition for review filed more than 30 days after EPA approval, based upon new information which arose more than 30 days after such approval, is proper only when such information has first been presented to the Administrator and the Administrator has failed to act.[6]

In this brief amici will not address the second issue of how and under what circumstances a petition for review may be filed more than 30 days after the Administrator has approved a state implementation plan. Instead, we will focus solely on whether the Eighth Circuit was correct in holding that "Congress intended to preclude economic and technological factors from the Administrator's consideration of whether to approve an implementation plan,"[7] and that "economic and technological considerations do not afford a basis for . . . review under section 307(b)."[8]

Amici will show that this determination by the court of appeals below cannot be supported by the language of the Act or by its legislative history, and that every other court of appeals that has considered the question has recognized the relevance of technological and

[6] Both of these issues are encompassed in Question 1 to which this Court's grant of the petition for a writ of certiorari was limited.

[7] 515 F.2d at 215.

[8] 515 F.2d at 219.



economic factors. Amici will also show that the Clean Air Act requires that these factors be considered:

(1) in determining whether a plan will assure attainment of primary standards as expeditiously as practicable, or of secondary standards within a reasonable time;

(2) where failure to consider and account for such factors would interfere with attainment and maintenance of the standards; and, most importantly,

(3) where the plan is more stringent than necessary to insure attainment of the standards.

## ARGUMENT

### I. The Court Below Misconceived the Role of the Court of Appeals Under Section 307(b)(1) When It Is Reviewing the Administrator's Approval of an Implementation Plan.

Fundamental to the decision of the court of appeals below was its approach to the role of the court upon review of the Administrator's approval of implementation plans under Section 110 of the Act. The court's conclusion that economic and technological considerations do not afford a basis for judicial review under Sectin 307(b)[9] was based in part upon its interpretation of the Administrator's authority in reviewing and approving state plans under Section 110. Equally important, however, was the court's determination that under Section 307(b) the courts have only a very limited role in reviewing determinations of the Administrator. The court noted that even if technological and economic factors were to be considered by the Administrator in his consideration of whether to ap-

[9] 42 U.S.C. § 1857h-5(b) (1970).

prove an implementation plan, such factors could not be considered on judicial review of his approval:

> "the mandatory and directory language of section 110(a)(2) would preclude using such grounds as a basis for setting aside his action on a petition for review under section 307(b)(1)." 515 F.2d at 216.

At another point the court stated:

> "While the considerations Petitioner asserts in its petition for review are important ones needing resolution, they are not appropriate for judicial resolution but are essentially legislative judgments as to where the public interest lies. Whether the public interest would be best served by closing plants or by allowing some variances from the national program for clean air we cannot say. This is, of course, a current concern of Petitioner as well of almost all citizens in this country. However, the statement of this concern does not thereby render it into one capable of judicial resolution.
>
> "This is in essence a political question." 515 F.2d at 219.

These conclusions by the Eighth Circuit are contrary to accepted standards of judicial review, and to the intent of Congress that the courts of appeals exercise a special role in their review of the Administrator's decisions under the Clean Air Act. In *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 647-48 (D.C. Cir. 1973), the court emphasized that "a court's role on judicial review embraces that of a constructive cooperation with the agency involved in furtherance of the public interest," and requires the reviewing court to review evidence even on "technical and specialized matters," to "penetrate the underlying



decisions of the agency," and to satisfy itself that the Administrator "meet[s] the burden of proof which . . . [is] properly assignable to him." Recognizing that environmental litigation represents a "new era" in administrative law, the courts have required that the agency provide "a framework for principled decision-making,"[10] and that "reasoned conclusions" from the "whole record" be made.[11] A reviewing "court exercises this aspect of its supervisory role with particular vigilance if it 'becomes aware, especially from a combination of danger signals, that the agency has not really taken a "*hard look*" at the salient problems, and has not genuinely engaged in reasoned decision-making.' "[12]

As Judge Leventhal noted in *Kennecott Copper Corp.* v. *EPA,* 462 F.2d 846, 848 (D.C. Cir. 1972), the courts of appeals have been "assigned special responsibility" for reviewing cases involving challenges to EPA action. This special responsibility derives from the statutory role entrusted to the courts by Congress under Section 307(b) of the Clean Air Act. The legislative history of the Act is unmistakeable on this point.

As the bill passed the House there was no counterpart of Section 307 providing for statutory judicial review of administrative decisions. The Senate added

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[10] Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597-98 (D.C. Cir. 1971).

[11] City of Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972).

[12] Leventhal, H., "Environmental Decisionmaking and the Role of the Courts," 122 U. Pa. L. Rev. 509, 511 (1974), *quoting* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971).

a statutory judicial review provision, but it provided that "[a]ny determination or finding of the Secretary, subject to challenge under this subsection, shall be presumed correct."[13]

The Senate and House Conferees retained the statutory review provisions of the Senate bill, but they explicitly rejected the limited scope of review contained in that bill by eliminating the presumption of correctness. The Conference Report provides no elaboration on this elimination of the presumption, but in discussing the Conference substitute on the Senate floor Senator Cooper took special pains to emphasize the important role of the courts in judicial review of administrative actions under the Act:

> "It would be difficult to single out any provision in this bill for special attention. I think it represents a firm application of pollution control procedures, while at the same time being just and incorporating throughout, due process and fairness. The bill provides many procedural protections and *involves the judicial branch of Government to a degree never before attempted in programs to achieve environmental quality.*"[14]

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[13] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 125 (1970) (hereinafter "S. Rep."). In spite of this presumption of correctness, the Senate Committee made clear that the administrative decisions were not to be deemed "conclusive" and that the presumption was rebuttable upon a showing that the administrative decision "is not supported by a preponderance of its evidence." *Id.* at 41.

[14] A Legislative History of the Clean Air Amendments of 1970, Prepared for the Senate Comm. on Public Works by the Congressional Research Service, Serial No. 93-18, 93d Cong., 2d Sess. (hereinafter "Legis. Hist."), at 149; 116 Cong. Rec. S20610 (1970) (emphasis added).



As finally enacted, Section 307 provided for judicial review without the provision that administrative determinations were presumed to be correct.[15]

These expressions of Congressional intent as to the role of the courts in judicial review of administrative action under the Clean Air Act are totally at odds with the Eighth Circuit's concept of limited judicial involvement. Congress fully recognized that administrative determinations under the Clean Air Act would have far reaching economic and social effects, and that such determinations must be subject to judicial review "to a degree never before attempted in programs to achieve environmental quality."[16] The Eighth Circuit's attempt to write the courts out of any significant role in the supervision of the administration of the Clean Air Act is unsupportable in the light of the unambiguous Congressional intent.

There is another respect in which the Eighth Circuit appears to have misconceived the role of the court. In describing the scope of review of the Administrator's action, the court stated that "review is limited to determining whether the Administrator's decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' ", citing 5 U.S.C. § 706(2)(A), and this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971). 515 F.2d at 214.

The Eighth Circuit's decision in this regard reflects a departure from this Court's previous decisions, and a confusion as to the proper scope of review of agency rulemaking which should be clarified by this Court.

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[15] Legis. Hist. at 185, 207; H.R. Rep. No. 91-1793, 91st Cong., 2d Sess. 35, 57 (1970) (hereinafter "Conf. Rep.").

[16] Legis. Hist. at 149; 116 Cong. Rec. S20610 (1970).

The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, recognizes that administrative decision-making may take the form of adjudication, formal rulemaking, informal rulemaking, or nonformalized decision-making. It is quite clear that the Administrator's action in approving state plans is rulemaking within the meaning of the APA, and it therefore follows that the substantial evidence test should be applied.

A rule is defined by the APA as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4) (1970). The Administrator's approval clearly falls within this definition. In fact, the Administrator himself described his action in approving state plans as rulemaking. *See* 37 Fed. Reg. 10842, 10846 (1972). Since the APA is applicable unless specifically excepted by statute, 5 U.S.C. § 559 (1970), and since the Clean Air Act does not expressly exempt agency action from the APA,[17] the Administrator's approval constitutes informal rulemaking subject to all the procedural safeguards set out in Section 4 of the APA, 5 U.S.C. § 553 (1970).

The formal determinations made by the Administrator in deciding to approve a state plan must be reviewed under the substantial evidence test.[18] Section 10(E) of the Administrative Procedure Act, which sets forth the scope of review for a court reviewing agency action, provides in pertinent part:

[17] Indeed, Section 310(a) of the Clean Air Act expressly states that the Act does not supercede other statutory provisions. 42 U.S.C. § 1857i(a) (1970).

[18] *See generally,* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Consolo v. FMC, 383 U.S. 607, 620 (1966).



"The reviewing court shall—

* * *

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . . ." 5 U.S.C. § 706 (1970).

Although it is readily apparent that the Administrator's action is not subject to Sections 556 and 557, which apply to formal adjudication and formal rulemaking, the "or otherwise" clause is clearly applicable since only informal rulemaking also produces a "record" for review.[19]

The conclusion that substantial evidence is the appropriate standard of review in informal rulemaking proceedings is underscored by this Court's opinion in *Overton Park, supra.* In that case the Court held that the arbitrary and capricious test applies to nonformalized decision-making in which the agency is not required to allow for public participation and there is no "record that is to be the basis of agency action. . . ." However, the Court went on to state that "[r]eview

[19] The House Report on the bill which became the APA shows that Section 553 informal rulemaking produces a "record." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 25 (1946); *see* Note, Judicial Review of the Facts in Informal Rule-making: A Proposed Standard, 84 Yale L.J. 1750 (1975). In addition, this Court has indicated that the informal notice-and-comment rulemaking procedures of the APA constitute a "hearing" within the meaning of the rulemaking section of the APA. United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973). Since the APA requires notice and comment in connection with informal rulemaking, there is an "agency hearing provided by statute" within the meaning of Section 706(2)(E).

under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U.S.C. § 553 . . ., or when the agency action is based on a public adjudicatory hearing. *See* 5 U.S.C. §§ 556, 557. . . ." 401 U.S. at 414. This Court has applied the substantial evidence test in other cases where the notice and comment provisions of Section 553 were followed.[20]

As we have shown above, the legislative history of the Act demonstrates Congress' intent that the reviewing courts be involved to a substantial degree. The role of the court and scope of review posited by the Eighth Circuit is unduly narrow and inconsistent with both Congressional intent in enacting the Clean Air Act and the requirements of the APA.

## II. Under Section 110(a)(2)(A) the Administrator Must Take Into Account Technological and Economic Factors in Order to Determine Whether a State Implementation Plan Will Provide for Attainment of the Primary Standard as Expeditiously as Practicable and for Attainment of a Secondary Standard Within a Reasonable Time.

Section 110(a)(1) of the Act provides that each state shall adopt and submit to the Administrator a plan which provides for implementation, maintenance and enforcement of the primary and secondary ambient air quality standards promulgated pursuant to Section 109. Once a state plan has been submitted to the Administrator, he must approve the plan if he determines that it was adopted after reasonable notice and hear-

[20] *See* United States v. Midwest Video Corp., 406 U.S. 649, 671, 673 (1972) (plurality opinion of Brennan, J.); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 746, 753 (1972).



ing and if it meets the specific requirements set forth in Section 110(a)(2). The first requirement for such a plan—set forth in Section 110(a)(2)(A)—is that it provide for the attainment of the national primary air quality standard "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan . . .", and that the plan specify a "reasonable time" for attainment of the relevant national secondary ambient air quality standard. 42 U.S.C. § 1857c-5(a)(2)(A) (1970).

In the Administrator's determination of whether a state plan meets these requirements of Section 110(a)(2)(A), technological and economic factors are relevant in at least two respects:

(A) The "practicability" of expeditious attainment of a primary standard and the "reasonableness" of the time for attainment of a secondary standard will depend in large part upon the cost and availability of technology for compliance with the emission limitations and other controls in the implementation plan.

(B) The capability of an implementation plan to assure timely attainment of the standards may well turn on whether the necessary fuels and technology for compliance with the plan are or will be available within the specified time.

### A. THE PRACTICABILITY AND REASONABLENESS OF THE TIME FOR ATTAINMENT OF THE STANDARDS.

The practicability test with regard to the primary standard and the reasonableness test with regard to the secondary standard are not further elaborated upon in Section 110, or elsewhere in the Act. It would seem to be clear, however, that if an implementation plan required compliance immediately, or well in advance of

the three-year outside date specified in Section 110(a)(2)(A), a person affected by the standard should be permitted to submit evidence as to whether such early compliance is feasible from the standpoint of available technology or the costs of such prompt compliance. Similarly, the question of whether an implementation plan provides for attainment of a secondary standard within a "reasonable time" would appear to turn on such questions as the availability of technology, and the costs of installing the technology necessary for compliance within the time specified.

This interpretation of Section 110(a)(2) is reflected in the legislative history of the 1970 Amendments. For example, the summary of the conference agreement introduced by Senator Muskie in its discussion of Section 110 states that provisions of a state plan designed to meet the secondary standards within a reasonable time "should be *related to the difficulties* with which a particular region is confronted." [21]

The concept of reasonableness and practicable attainment of the standards has also been addressed by the courts. In *St. Joe Minerals Corp.* v. *EPA*, 508 F.2d 743, 748 (3d Cir. 1975), for example, the Third Circuit reasoned that considerations of practicability and reasonableness in Section 110(a)(2)(A) require that EPA review the feasibility of a state plan:

> ". . . Congress would have made its purpose more explicit if it had intended by section 110(a)(2) to limit the Administrator's authority so as to require him to effectuate an implementation plan even though compliance with such plan is technologically infeasible and the constraints in the plan have not been shown to be essential to the accomplishment of the national standards.
>
> "A review by the EPA of the feasibility of an implementation plan is not inconsistent with the statutory language. The Administrator is directed to determine whether an implementation plan provides for the attainment of primary ambient air quality standards 'as expeditiously as *practicable*' and secondary standards within 'a reasonable time.' These temporal qualifications suggest that in considering an implementatation plan the Administrator should evaluate the workability of the proposed limitations." 508 F.2d at 748 (footnotes omitted).

[21] Legis. Hist. at 132; 116 Cong. Rec. S20600 (1970) (emphasis added).



In fact, the Administrator himself has recognized the clear relevance of economic and technological factors under Section 110(a)(2)(A) of the Act in regulations establishing requirements for the preparation and submission of implementation plans.[22] The agency's regulations require the attainment and maintenance of secondary standards for sulfur oxides to be achieved through the application of *"reasonably available control technology"* and where such technology will not be sufficient, the time required for attainment shall depend, *inter alia,* "on the social, *economic,* and *techno-*

[22] 40 C.F.R. Part 51. These regulations were first published on August 14, 1971, 36 Fed. Reg. 15486-15506 (1971). They are, of course, binding on the Administrator. *See* Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954); Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Service v. Dulles, 354 U.S. 363, 372 (1957); NLRB v. United Brotherhood of Carpenters, 261 F.2d 166, 170 (7th Cir. 1958); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959); Pacific Molasses Co. v. FTC, 356 F.2d 386, 390 (5th Cir. 1966); and United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969).

*logical* problems involved in carrying out a control strategy adequate for attainment and maintenance of such secondary standard."[23] "Reasonably available control technology" is defined as "devices, systems, process modifications, or other apparatus or techniques, the application of which will *permit attainment* of the emission limitations set forth in Appendix B to this part . . . ."[24]

If under these regulations a state is required to consider such technological and economic factors in specifying times for compliance with the provisions of its plan and attainment of the standards, then it should be just as clear that the Administrator is required to review the action of the state in this regard and approve that aspect of the plan "if he determines" that the requirements of Section 110(a)(2)(A) have been met. In making that determination he must necessarily take into account the technological and economic factors considered by the state and upon which its decision was made. It is precisely that determination of the Administrator under Section 110(a)(2) in approving a state implementation plan that is reviewable under Section 307(b)(1).

**B. THE EFFECTIVENESS OF THE PLANS TO ATTAIN THE STANDARDS.**

The requirement of Section 110(a)(2)(A) that a state plan provide for attainment of primary standards as expeditiously as practicable, but in no case later than three years from the date of approval of the plan, and the related requirement of Section 110(a)(2)(B) that

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[23] 40 C.F.R. § 51.13(b)(2) (1975) (emphasis added).

[24] 40 C.F.R. § 51.1(o) (1975) (emphasis added). Appendix B of Part 51 sets forth EPA's conclusions as to emission limits achievable using reasonably available technology.



the plan include such emission limitations and other controls as may be necessary to insure attainment of the standard, impose an obligation on the Administrator to review the provisions of a state plan in order to satisfy himself that adequate and effective pollution abatement equipment will be available so that the affected sources within the state will be able to comply within the specified time. Suppose, for example, that in allocating needed reductions in sulfur dioxide emissions a state imposed the principal burden for attaining those reductions on one industry—say electric power plants—and imposed correspondingly lax limitations on other sulfur dioxide sources in the state. If the Administrator determined, on the basis of data and information before him, that the electric power plants within the state would not be able to achieve the prescribed reduction within the specified time because of the unavailability of either the necessary pollution abatement equipment or low sulfur fuels, then under the terms of Section 110(a)(2)(A) and (B) it would appear that the Administrator is required to disapprove the plan and to inform the state that a different mix of emission limitations is necessary if the standard in question is to be attained.

This Court made clear in its opinion in *Train* v. *NRDC*, 421 U.S. 60, 79 (1975), that under Section 110(a)(2) the states are given broad discretion to decide how the burden of attaining the standard should be borne among the various sources and classes of sources within the state:

> "Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission

limitations it deems best suited to its particular situation."

In short, Congress "left to the States considerable latitude in determining specifically *how the standards would be met.*" [25]

But this broad discretion in the states to decide upon the mix of emission limitations and controls for attainment of a standard is of course subject to the basic requirement that the controls selected by the state in fact achieve attainment of the standard within the time required. Accordingly, the Administrator must make a determination as to the achievability of the particular limitations selected by the state in its implementation plan, in the light of all relevant factors, including technological and economic considerations. This obligation of the Administrator was recognized by the Fourth Circuit in *Appalachian Power Co.* v. *EPA*, 477 F.2d 495, 506 (4th Cir. 1973), in rejecting EPA's argument that economic and technological factors are not relevant in the review of state plans:

> "After all, the Administrator's responsibility is to determine whether the proposed plan is practical and reasonably likely to achieve the results required under the Amendments; and, if he finds it reasonably unlikely to achieve such results within the fixed time-tables, whether for technological or economic reasons, or otherwise, he should reject the plan and return it to the state authorities with instructions to consider alternative procedures that might meet the statutory requirements as established by the Administrator."

[25] 421 U.S. at 87 (emphasis added).



There is another respect in which technological and economic factors may be relevant to the Administrator's determination of whether a state implementation plan will provide for timely attainment of the national standards. In the preamble to the May 31, 1972, notice of approval of the initial state implementation plans, the Administrator stated:

> ". . . in addition to reviewing the effectiveness of each State implementation plan, *this Agency and the Federal Government have an obligation to assess the impact of the various plans in the aggregate.* From this standpoint, there is strong evidence that the complete implementation of the plans as submitted may not be attainable in the time prescribed." [26]

Part of the evidence referred to was the lack of adequate supplies of "clean" fuels:

> "Because of physical limitations on our ability to clean the emissions of high sulfur fuels on a large scale in the time permitted by the statute, achievement of the particulars of the State plans would require the availability of large additional supplies of 'clean' fuels—natural gas and low sulfur coal and oil. . . . Unfortunately, these naturally clean fuels are not likely to be available in quantities necessary to meet the projected demand." [27]

The preamble went on to state:

> "Preliminary analysis by EPA indicates the real possibility that, under current conditions in the domestic and world fuel markets including the absence of the sulfur tax all aspects of the State

[26] 36 Fed. Reg. 10843 (1972) (emphasis added).
[27] *Id.*

> Plans *in the aggregate* cannot be achieved by 1975 despite the best efforts of both government and the private sector." [28]

The Administrator thus recognized that state plans must be considered not only on an individual basis in determining whether the requirements of Section 110 (a)(2)(A) and (B) will be met, but also that the state plans must necessarily be considered as they relate to one another and in the aggregate. Although a state may indeed have great latitude in adopting whatever mix of emission limitations it deems best suited to its particular situation, the Administrator would be obligated to disapprove the provisions of a state plan if he determined that they would result in unreasonable and unnecessary demands upon available technology or limited supplies of clean fuels, and thereby jeopardize the attainment of the standards in other states.

These and related questions clearly call for an evaluation of technological and economic factors by the Administrator in his appraisal of the inter-related and aggregate impact of state implementation plans, and for consideration of such factors in judicial review of any determinations he makes with respect to his approval of such plans. In short, the Administrator can determine whether a state plan meets the requirements of Section 110(a)(2)(A) and (B) only if he takes into account technological and economic factors. Under the provisions of Section 307(b)(1) his consideration of such factors and his determination thereon are subject to judicial review in the court of appeals.

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[28] 37 Fed. Reg. 10844 (1972).



## III. Under Section 110(a)(2)(B) the Administrator Must Take Into Account Technological and Economic Factors in Order to Determine Whether a State Implementation Plan Includes Emission Limitations and Other Measures as May Be Necessary to Insure Attainment and Maintenance of the Primary and Secondary Standards.

In the previous sections we have shown that the Act requires that the Administrator take into account technological and economic factors in determining whether a state implementation plan is consistent with the requirements of Section 110(a)(2)(A) that plans provide for attainment of the national primary ambient air quality standard as expeditiously as practicable, and for attainment of the national secondary air quality standard within a reasonable time. Of equal or greater significance to the question of the relevance of technological and economic factors in the Administrator's review of a state implementation plan is the requirement in Section 110(a)(2)(B) that the Administrator must determine whether a plan:

> "includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls . . . ." [29]

As we have seen, Section 110(a)(2)(A) contains the basic requirement that a state plan must provide for attainment of the ambient air quality standards. Subparagraph (B) makes it clear that the state is not left complete discretion as to how its plan may assure attainment, by requiring that a state plan include emis-

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[29] 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

sion limitations, schedules and such other measures "as may be *necessary* to insure attainment" of the standards.

In one sense the "as may be necessary to insure attainment" language restates the requirement of subparagraph (A) that the provisions of the plan must be such as to insure attainment of the standards. But this aspect of subparagraph (B) would be totally redundant if it did nothing more than state that plan provisions must assure attainment of the standards. Both logic and common sense would suggest that subparagraph (B) was intended to impose some additional requirement, and the statutory language supports this conclusion, for the word "necessary" includes the connotation that a state implementation plan may not be approved by the Administrator if it contains emission limitations or other controls that are not required to insure attainment of the standards. In short, if a particular emission limitation or other control could be shown to be overly restrictive and thus not necessary to assure attainment, then it would not fall within the precise wording of Section 110(a)(2)(B).

Under this analysis, technological and economic factors are significant in the Administrator's determination of whether a state implementation plan meets the requirements of Section 110(a)(2)(B). If a particular plan sought to impose controls that were more stringent than necessary to assure attainment of the standard, and if such controls could be shown to impose excessive costs on particular sources, or to require sources to close because of the unavailability of technology, then the Administrator would be required to conclude that the provisions in question were arbitrary and unlawful, and thus subject to disapproval.[30] This interpretation of Section 110(a)(2) is supported both by well-reasoned judicial analysis and the legislative history of the statutory provisions.



### A. JUDICIAL CONSIDERATION OF SECTION 110(a)(2).

At least three courts of appeals have held—contrary to the Eighth Circuit—that technological and economic factors are relevant to the consideration of an implementation plan under Section 110(a)(2), where the provisions in question have not been shown to be necessary for attainment of the national standards. In *St. Joe Minerals Corp.* v. *EPA,* 508 F.2d 743, 748 (3d Cir. 1975), the Third Circuit concluded that "the Act does not expressly empower the agency to disapprove a plan where restrictions are too narrow to be practicable," but it went on to hold:

> "Certainly, however, Congress would have made its purpose more explicit if it had intended by section 110(a)(2) to limit the Administrator's authority so as to require him to effectuate an implementation plan *even though compliance with such plan is technologically infeasible and the constraints in the plan have not been shown to be essential to the accomplishment of the national standards.*" (Emphasis added).

Although the court did not specifically refer to the "as may be necessary" language of Section 110(a)(2)(B),

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[30] The grounds in the petition for review filed with the Eighth Circuit below included allegations that sulfur dioxide removal equipment has not been developed and costs in excess of $500 million, and that compliance with the sulfur dioxide provision of the state plan "is not necessary to attain the national primary ambient air standards . . . ." 515 F.2d at 210 n.8, 220.

its conclusion is consistent with the wording of that provision.[31]

Similar expressions of the significance of economic and technological considerations under Section 110(a)(2) are found in two cases in which the Administrator had disapproved particular state plan provisions and had promulgated substitute plan provisions under the procedures of Section 110(c)(1) of the Act.[32] Although these cases dealt with the promulgation of implementation plan provisions by EPA, rather than by the state, it is clear that the statutory standards for the EPA promulgation are those set forth in Section 110(a)(2)—the very provisions that are applied by the Administrator in determining whether to approve a state-promulgated plan. In *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 676 (1st Cir. 1974), the court reviewed EPA's promulgation of a transportation control plan for Boston, and concluded that Congress intended the Administrator to enforce compliance with air quality standards even if the costs were great. On the other hand, the court stated that EPA had an obligation to select the least burdensome effective alternative:

> "Economic considerations may play some role, however, in EPA's selection among alternative means to achieve its mandated clean air goal. EPA guidelines encourage states to identify 'costs and benefits' of alternative control strategies. Although

[31] *See also* Appalachian Power Co. v. EPA, 477 F.2d 495, 505 (4th Cir. 1973), in which the Fourth Circuit rejected the government's argument that the Administrator "makes no review of either the economic or technological feasibility of the plan in exercising his power to approve or disapprove the state plan."

[32] 42 U.S.C. § 1857c-5(c)(1) (1970).



> we do not read the Act as requiring EPA to engage in exhaustive cost benefit studies or to initiate elaborate planning exercises, *it could be arbitrary and capricious for the Agency to reject obviously less burdensome but equally effective controls in favor of more expensive or onerous ones.* But we think a considerable part of the burden of suggesting attractive alternative strategies is upon those, like the petitioners, who dislike the present ones." 504 F.2d at 676 (emphasis added) (footnotes omitted).

Most recently the United States Court of Appeals for the District of Columbia Circuit has likewise held that costs and related factors must be taken into account by the Administrator in promulgating a substitute plan to implement Section 110(a)(2). In *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), the court remanded to EPA that part of an implementation plan promulgated by the agency establishing certain bicycle regulations for the National Capital Region. The court stated:

> "After considering this evidence, we must agree with petitioners that the record is simply not sufficient to support promulgation of bicycle regulations for the National Capital Region. In particular, while the Philadelphia study might be a sufficient basis for promulgating bicycle regulations for Philadelphia, it is not adequate to establish that such regulations are *necessary, desirable or practical* for this Region. These regulations will accordingly be remanded to the Administrator for reconsideration. Such reconsideration should include *consideration of cost factors as related to anticipated benefits.*" 521 F.2d at 997 (emphasis added).

Thus, the First, Third and D.C. Circuits have all squarely held that economic and technological factors

must be taken into account by EPA in its consideration of implementation plan provisions under Section 110 (a)(2), at least where it has not been shown that the provisions are necessary for attainment of the standard. None of the circuits sought to rely on a detailed analysis of specific statutory language in support of its conclusion. In each case, however, the holding of the court is consistent with the requirement of Section 110(a)(2)(B) that the control provisions of an implementation plan must not only insure attainment of the national standards, but must also be "necessary" to assure attainment. Control provisions shown not to be necessary and shown to impose unreasonable costs or shown to be tied to technology that is not available must be disapproved by EPA, or invalidated on judicial review if approved by EPA.

### B. THE LEGISLATIVE HISTORY OF SECTION 110(a)(2).

In concluding that technological and economic factors may not be considered by the Administrator in deciding whether to approve an implementation plan, the court below relied primarily on the premise that the state was free to adopt its own implementation plan provisions subject only to the requirement that EPA find that the plan assured attainment of the national standards. As stated by the Eighth Circuit:

> "Congress left it to the States to determine economic and technological questions so long as the state's plan would attain the national standards." [33]

[33] 515 F.2d at 216. The court also stated that "it cannot be contended that the States are limited in their implementation plans to doing no more than assuring that the national standards are to be met and maintained." 515 F.2d at 220.



In reaching this conclusion the court either overlooked or misread the legislative history of Section 110(a).

As enacted by Congress in 1970 the Clean Air Act provisions relating to the promulgation of implementa- plans are focused solely and exclusively on attaining the national primary and secondary ambient air quality standards promulgated by EPA pursuant to Section 109.[34] For example, in Section 107, relating to the establishment of air quality control regions, it is stated:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State *which will specify the manner in which national primary and secondary ambient air quality standards will be achieved* and maintained within each air quality control region in such State." [35]

Similarly, Section 110(a)(1) provides for the states to adopt and submit an implementation plan to the Administrator "which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region. . . ." [36] Section 110(a)(2)(A) provides that a plan in order to be approvable by the Administrator must provide "for the attainment of such primary standard as expeditiously as practicable. . . ." [37] And Section 110(a)(2)(B) provides that the plan must include emission limitations and such other measures as may be neces-

[34] 42 U.S.C. § 1857c-4 (1970).
[35] 42 U.S.C. § 1857c-2(a) (1970) (emphasis added).
[36] 42 U.S.C. § 1857c-5(a)(1) (1970).
[37] 42 U.S.C. § 1857c-5(a)(2)(A) (1970).

sary "to insure attainment and maintenance of such primary or secondary standard. . . ."[38]

In every case the state plan provisions are described and limited in terms of attaining and maintaining the national ambient air quality standards promulgated by EPA. There is nothing in any of these provisions that refers to more stringent state standards, or to state plan provisions more stringent than necessary to assure attainment of the national standards. The legislative history of these provisions demonstrates that this failure of the implementation plan provisions of Section 110(a) to refer to more stringent state standards and limitations was by no means an oversight. On the contrary, the House and Senate Conferees expressly decided to *eliminate* language which had been contained in bills passed by both Houses referring to more stringent state standards and limitations.

During its consideration of the Clean Air Act the House reported out a bill (H.R. 17255) which provided for the adoption of national ambient air quality standards and for the submission of state plans to the Secretary. The House proposal would have rewritten proposed Section 108 so that a state plan would be approved by the Administrator if he determined

> "that the plan is consistent with the purposes of this Act insofar as it assures achieving such standard of air quality within a reasonable time." Legis. Hist. at 914; H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 29 (1970) (hereinafter "H. Rep.").

Significantly, the bill went on to provide:

> "A State may adopt an ambient air quality standard applicable to such State or any portion thereof for any pollutant if the [Administrator] agrees such State standard is more stringent than the national ambient air quality standard for such pollutant." Legis. Hist. at 915; H. Rep. at 30.

[38] 42 U.S.C. § 1857c-5(a)(2)(B) (1970).



The House Committee thus made explicitly clear its intention that states may adopt a more stringent ambient air quality standard than the federal standard, and that state plan provisions for the attainment of such standard would become the applicable plan for purposes of both state and federal enforcement.

Similar provisions were contained in the bill passed by the Senate. As reported by the Senate Committee the bill provided for the promulgation of national air quality standards and goals by EPA and for the adoption by the states after a hearing of implementation plans for the implementation, maintenance and enforcement of such standards and goals. Legis. Hist. at 542-44; S. Rep. at 12-14. Section 111(a)(1) (subsequently to become Section 110 of the Act) went on to provide, however:

> "Unless a separate public hearing is provided, each State shall consider adoption of ambient air quality standards which are *more restrictive* than the national ambient air quality standards at the hearing required by this paragraph." Legis. Hist. at 544; S. Rep. at 14 (emphasis added).

Under Section 111(a)(2) the Secretary was required to approve a state implementation plan if he determined that it met certain specified conditions. As in the present law, he was required to determine that the plan provided for the attainment of the national standards within a specified period. In addition, the plan would be subject to approval by the Administrator if he determined that it:

"(B) includes emission requirements, schedules and timetables of compliance, and such other measures as necessary to insure attainment of *any* applicable ambient air quality standard and goal; . . . ." *Id.* (emphasis added).

This language in the Senate passed bill thus required that state plans provide for the attainment and maintenance of the national ambient standards, that states hold a hearing to consider the adoption of more restrictive ambient air quality standards, and that state plans include emission requirements and such other measures "as necessary to insure attainment of any applicable ambient air quality standard." This reference to "*any* applicable ambient air quality standard" obviously referred to either the national ambient air quality standard to be promulgated by EPA or the more stringent state ambient air quality standard referred to in Section 111(a)(1) of the bill.

In reconciling the Senate and House passed bills, the Conferees essentially followed the language of the Senate measure, but made some significant changes. All references to more stringent state standards in Section 110 were eliminated, so that the only reference was to national standards as promulgated by EPA. The final Act—unlike the House and Senate bills—neither encourages nor directs states to consider the adoption of more stringent ambient air quality standards. In addition, the language of Section 110(a)(2)(B) was modified so that instead of referring to attainment of "any applicable ambient air quailty standard" it referred to attainment of "such primary or secondary standard," that is, the national standards promulgated by EPA. Section 110(a)(2)(A)(i).



The Conference Report does not comment upon or seek to explain these modifications in the Senate passed bill, but it is significant that in the Conference Report description of the Senate bill there is a specific reference to the requirement that "each State was to hold public hearings and adopt a plan to implement the *national* ambient air quality standards (or the more stringent *State* standards). . . ." Legis. Hist. at 195; Conf. Rep. at 45 (emphasis added). The obvious deliberate decision of the Conferees to eliminate the explicit provisions in both the House and Senate bills requiring state consideration of more stringent standards (and more stringent implementation plan provisions to meet such standards), must be considered significant for purposes of interpreting the Congressional intent in Section 110(a)(2).

This legislative history, together with the reference in Section 110(a)(2)(B) to such control provisions "as may be necessary to insure attainment and maintenance" of the national standards, reflects a Congressional determination that the federal air quality program should be adopted and enforced in such a way as to insure attainment of the *national* ambient air quality standards. State efforts to promulgate any more stringent standards or to impose more stringent control measures than necessary were not intended to be part of the federal scheme, and thus not subject to approval by EPA and enforceable by the federal government.[39] Instead, the Congressional plan was intended to assure attainment on a national basis of the national standards.

In its consideration of the legislative history of the Clean Air Act the court below made no reference what-

[39] *See* Section IV, pp. 33-38, *infra*.

ever to these changes made by the Conferees, and the elimination in Section 110 of any language encouraging or directing the states to adopt more stringent ambient air quality standards. Instead, the court placed great reliance on the following passage in the Senate Report:

> "In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility *as the basis of ambient air standards.* The Committee determined that (1) the health of people is more important than the question of whether the early *achievement of ambient air quality standards protective of health is technically feasible;* and, (2) the growth of pollution load in many areas, even with the application of available technology, would still be deleterious to public health.
>
> "Therefore, the Committee determined that existing sources of pollutants either should *meet the standard* of the law or be closed down, and in addition that new sources should be controlled to the maximum extent possibe to prevent atmospheric emissions." 515 F.2d at 215 (emphasis added), *quoting* from Legis. Hist. at 402-03; S. Rep. at 2-3.

In concluding that this language evidenced a Congressional intention to preclude economic and technological factors from the Administrator's consideration of whether to approve an implementation plan, the court below failed to recognize the distinction between considerations relating to the promulgation of ambient air quality standards, and considerations relating to the adoption of implementation plan provisions necessary for the attainment of such standards. The first paragraph of the quoted portion of the Senate Report is quite clearly referring to the establishment of air quality standards, rather than implementation plan



provisions designed to achieve the standards. The second paragraph suggests that sources operating in such a way as to preclude attainment of the standards should be closed down. Whether or not such a harsh result is carried forward into the Act, it is clear that the reference here is to promulgation and attainment of the standard rather than to the promulgation of specific implementation plan provisions.

At any rate, there is no suggestion in this language from the Senate Report that the promulgation of implementation plan provisions should not take into account technological and economic feasibility, at least where an implementation plan provision is more stringent than necessary to assure attainment of the national standard. The language of Section 110(a)(2)(B), and the action of the Conferees in eliminating the references to more stringent state standards, evidence a Congressional intent that technical and economic factors be considered in the promulgation and approval of implementation plan provisions that are or may be more stringent than necessary for the attainment of the national standards.

### IV. Under Section 116 of the Act Standards More Stringent Than Necessary Are Outside an Implementation Plan.

The court below sought additional support for its conclusion that technological and economic factors may not be considered on judicial review of EPA approval of a state implementation plan from Section 116 of the Act:[40]

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[40] 42 U.S.C. § 1857d-1 (1970), formerly Pub. L. 90-148, § 2, 81 Stat. 497 (former Section 109 was substantially amended and renumbered Section 116).

> "In addition, the fact that States may adopt and enforce emission standards and control strategies even more stringent than the federal serves to further limit the discretionary area of [the Administrator's] authority to approve or disapprove an implementation plan." [41]

Here again, however, the court below failed adequately to analyze the statutory language or to consider the relevant legislative history.

The Clean Air Act prior to the 1970 Amendments provided with respect to higher state standards:

> "Section 109. Nothing in this title shall prevent a State, poitical subdivision, inter-municipal or interstate agency from adopting standards and plans to implement an air quality program which will achieve a higher level of ambient air quality than approved by the Secretary."

As passed by the House the 1970 Amendments would have retained this provision, except to substitute the words "that prescribed or" before "approved" in order to account for the fact that under the House bill the Administrator would be authorized to promulgate national standards. Legis. Hist. at 912; H. Rep. at 27. As we have already shown, the House bill at this stage explicitly encouraged states to adopt ambient air quality standards more stringent than the national standards. *Supra* at pp. 28-29.

The bill passed by the Senate included a more comprehensive provision relating to state standards. It provided:

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[41] 515 F.2d at 212-13 (footnotes omitted).



> "Section 112. Nothing in this title shall be construed as preventing a State, political subdivision thereof, inter-municipal or interstate agency from adopting, within the time provided in sections 110 and 111 of this Act, or revising after such time, ambient air quality standards and implementation plans, including emission requirements, to implement an air quality program which will (A) attain and maintain a higher level of air quality than is specified in any national ambient air quality standard promulgated pursuant to this Act, or (B) attain and maintain the level of air quality specified in any national ambient air quality standard within a shorter period of time than required by this Act, or from adopting within the time provided in section 114 or section 115 of this Act, or revising after such time, emission standards more stringent than those established by the Secretary." Legis. Hist. at 553; S. Rep. at 23.

The Conferees accepted neither the House nor Senate version of this provision, and instead added a Section 116 which read as follows:

> "Except as otherwise provided . . . nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section." Legis. Hist. at 165; Conf. Rep. at 15.

This language, which became law, differs significantly from the corollary language in the Senate bill.

The Senate provision explicitly referred to the adoption by a state of ambient air quality standards and implementation plans "within the time provided in sections 110 and 111" which will attain and maintain a higher level of air quality than is specified in the national standard. It is clear that this provision, together with the language referred to earlier in Section 111(a)(1) directing the states to consider more stringent ambient air quality standards,[42] contemplated that the state would be permitted and encouraged to consider even more stringent air quality standards, as well as emission requirements to assure attainment of any applicable standard, *as part of the implementation plan* to be adopted and submitted by the state and approved by EPA.

The provision which became law, however, substantially modifies this language. First, Section 116 makes no explicit reference to state adoption of standards attaining a higher level of air quality. Instead, it expresses an intent not to deny a state the right to adopt any standard it wished, except for one which is less stringent than the national standards, as a matter of state law. Second, the language no longer contemplates the incorporation of the more stringent standard and corollary emission requirements within the state implementation plan to be submitted to EPA for approval. The reference to adoption of more stringent standards within the times provided in Sections 110 and 111 was eliminated. This change was consistent with the change made by the Conferees in Section 110, eliminating the specific Senate reference to state adoption of more stringent state standards, and emission limitations to achieve "any" applicable standard.

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[42] *Supra* at pp. 29-30.



In the light of these changes made by the Conferees in the Senate bill, an unmistakable statutory pattern emerges. As passed by the Senate, the bill directed states to consider adoption of more stringent standards within the time limits specified in the bill, and explicitly required that the implementation plan include emission requirements that would achieve any applicable national or more stringent state standard. The Conferees rejected this approach, eliminating the direction that states consider adoption of more stringent standards, and changing the language of Section 110 so that emission limitations would be those necessary to assure attainment of the national standards, rather than any applicable standard. Similarly, the changes in Section 116 eliminated the references to the adoption of more stringent state standards and implementation plans under the Clean Air Act.

What was left was a scheme under which EPA would adopt national standards and states would adopt implementation plans including emission limitations and other controls necessary to assure attainment of such standards. At the same time Congress made clear that a state could on its own—*i.e.*, independent of what was done within the implementation plan submitted to EPA—adopt any standard or limitation it wished, so long as it was not less stringent than those required to meet the national standards. The language of Section 116 makes clear that more stringent standards or limitations adopted by a state would be *outside* of the implementation plan, rather than a part of it.

The distinction is significant. The federal effort of administration and enforcement should be directed to achieving the national standards and should not be diluted by efforts directed at achieving more stringent

levels in particular states. Although the Act makes clear that the states themselves could go further than the national standards, more stringent standards and limitations were left to the states to enforce.

Under this statutory scheme, then, it is entirely logical that the Administrator would take into account economic and technological factors in reviewing state implementation plan provisions that are more stringent than necessary for attainment of the national standards. Thus, contrary to the conclusion of the court below, Section 116 has no application to the action of the Administrator in reviewing and approving a state plan under Section 110, or to a state in adopting and submitting such a plan for approval.

**V. Where the Courts of Appeals Have Held That Review of the Administrator's Failure to Consider Economic and Technological Factors Was Premature, the Parties to Those Proceedings May Subsequently Raise Issues Relevant to Those Factors in the Course of Enforcement Proceedings.**

This Court should also resolve issues arising from the sharp division in the circuits as to the time at which economic and technological factors must be considered. As we have shown, the language of the Clean Air Act, as supported by its legislative history, clearly requires the Administrator to consider economic and technological factors in determining whether to approve a plan under the criteria enumerated in Section 110(a)(2). In cases where the circuits have agreed with this interpretation, the Administrator has taken or will take appropriate action. *See Appalachian Power,* and *St. Joe Minerals, supra.* A problem arises, however, as a result of the decisions of the Sixth and Seventh Circuits, in which the courts properly ruled that economic



and technological factors were relevant, but held that such factors should be considered by the district court only at the time of enforcement and not during the approval process. *Buckeye Power, Inc.* v. *EPA,* 481 F.2d 162, 173 (6th Cir. 1973); *Indiana & Michigan Electric Co.* v. *EPA,* 509 F.2d 839, 844-45 (7th Cir. 1975). In order that the parties to the latter review proceedings have some opportunity to present their technological and economic arguments, they must be permitted to present those arguments to the district courts during proceedings brought to enforce the state plans. An affirmation of this right by this Court is particularly unwarranted in view of the Eighth Circuit's holding that such economic and technological factors need not be considered by the Administrator and in any event are "not appropriate for judicial resolution." 515 F.2d at 219.

Fairness to the petitioners in those cases clearly dictates such a result. In effect, the parties in the Sixth and Seventh Circuit cases were assured of a time and a forum in which to assert the technological and economic issues relating to the state plans in question, *i.e.,* before a district court at the time of enforcement. The parties having gained in substance the relief desired, there was thus no need to engage in the uncertain enterprise of seeking Supreme Court review as to the timing of such relief.[43]

The soundness of this proposition is underscored by the express provisions of Section 10(b) of the Admin-

[43] This Court could conceivably hold that EPA should withdraw and reexamine its approvals to date of *all* state plans, and allow affected parties to comment on economic and technological factors. The alternative proposed by amici is far narrower in scope and, we feel, sounder and administratively more expeditious.

istrative Procedure Act, which provides: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703 (1970). Because the decisions in *Buckeye Power, Inc., supra,* and *Indiana & Michigan Electric Co., supra,* squarely hold that judicial review of arguments relating to economic and technological factors could not be considered in a Section 307(b)(1) proceeding, no "prior, adequate, and exclusive opportunity for judicial review" of these issues had been provided to the parties in those cases. It follows that those aspects of the Administrator's approval are subject to review in "proceedings for judicial enforcement" of the relevant state plans. The Sixth and Seventh Circuit opinions clearly recognized that the result of their holdings was merely to delay consideration of the arguments being presented until such time as enforcement proceedings may be commenced.

Precisely because no prior opportunity for judicial review had been available, Section 307(b)(2) of the Act [44] should provide no obstacle to judicial review at the enforcement stage. The Seventh Circuit's opinion dealt succinctly with the applicability of this provision:

> "since we hold that a plan's technological feasibility and economic impact need not be considered by the Administrator in approving a state plan under Section 110(a)(2) and, a fortiori, that such fac-

[44] Section 307(b)(2) provides: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 1857h-5(b)(2) (1970).



> tors do not form a basis for review of such approval by this court under Section 307(b)(1), it follows that Section 307(b)(2) does not preclude petitioners from presenting technological feasibility and economic impact arguments in the course of enforcement proceedings." 509 F.2d at 845.

*See also Buckeye Power, Inc.* v. *EPA, supra,* 481 F.2d at 173. The Supreme Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 141 (1967), a landmark decision involving pre-enforcement review in the district courts, held that the presumption that judicial review is available can be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." There has been and can be no such showing here.[45]

Moreover, amici submit that even as to cases where there will be general consideration of technological and economic issues at the approval stage, the Act does not preclude further consideration of such issues at the enforcement stage. It is logical that issues of a general nature be considered at the approval stage, but the Senate Report on Section 307(b) makes it clear that "[o]f course, the person regulated would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to him alone." [46] If there are reasons why a state plan is un-

[45] Section 307 of the Act was intended to remedy the uncertainties in the then existing Clean Air Act relative to the availability of judicial review by explicitly providing for such review under Sections 307 and 304, the citizen suit provision. *See, e.g.,* Legis. Hist. at 440-42; S.Rep. at 40-42. It would be anomalous to interpret a provision intended to guarantee the availability of judicial review as, in effect, precluding such review.

[46] Legis. Hist. at 441; S. Rep. at 41.

duly stringent and economically or technologically unfeasible as applied to a particular source, the affected company should have the right to bring these factors to the attention of the district court in enforcement proceedings.

Finally, in light of the crabbed interpretation of the role of the courts by the Eighth Circuit, it would be appropriate for this Court to emphasize that during enforcement proceedings before the district court under Section 113 of the Act [47] the parties must have an opportunity for *de novo* consideration of their contentions. It could hardly be otherwise because the Clean Air Act provides no administrative procedure for determining whether a person has violated a state plan.[48] A natural reading of Section 113 leads one to the conclusion that the district court is the intended forum in which an alleged violator would get a full *de novo* hearing on any defenses he may wish to present. Such defenses would include the inapplicability or invalidity of a provision of the plan.[49]

*De novo* consideration of technological and economic factors at the enforcement stage is also warranted due to the absence of an adequate administrative record addressed to those issues. During the approval process

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[47] 42 U.S.C. § 1857c-8 (1970).

[48] It is true that the Administrator must notify a person that he is in violation of a requirement of an applicable implementation plan before a civil enforcement action may be commenced against him. However, a notification of violation is an entirely unilateral act of the Administrator. No formal opportunity to respond to the notice is provided for in the Act, or in EPA's regulations. Neither does the Act mention any other means to contest the Administrator's notification short of the civil enforcement proceeding.

[49] *See* Reichhold Chemicals v. EPA, 8 ERC 1207 (7th Cir. 1975).



of the state plans the Administrator observed none of the procedural requirements of the APA attendant to informal rulemaking. 5 U.S.C. § 553 (1970). As a result, no notice of proposed approval or disapproval was given the public and, more importantly, no comments were requested thereon. Faced with such a bare record, and faced with no determination by the Administrator as to the economic and technological feasibility of a state plan, an enforcement court would be required to engage in independent fact-finding, drawing its own conclusions from the record created. *See Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416, 420 (1971).[50]

These same considerations dictate in favor of judicial review of technological and economic factors on a *de novo* basis when a petition for review has been filed in the court of appeals based on grounds arising more than 30 days from the date of EPA promulgation or approval of an implemention plan. As in the case where *de novo* review is appropriate at the enforcement stage because of facts particular to the facility or because of the denial of appellate review by a court of appeals, there is no adequate administrative record with respect to issues based upon information arising more than 30 days after EPA has acted. This aspect of the decision below—although not addressed in this brief—is considered at length in the Brief for Petitioner at pages 12, and 22-32.

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[50] In one important respect the Sixth and Seventh Circuit cases are more compelling ones for *de novo* review than *Overton Park,* since under the former cases the parties will be defendants in civil or criminal enforcement proceedings. *See generally* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, The Federal Courts and the Federal System 338-44 (2d ed. 1973).

For the foregoing reasons, this Court should hold that where the circuit courts have ruled that economic and technological factors need not be considered at the approval stage, these factors must be considered by the courts *de novo* in enforcement proceedings. This Court should also hold that further consideration by the courts of economic and technological issues as they apply to the particular facility is required at the enforcement stage in all cases, and that such issues must be reviewed on a *de novo* basis where a petition for review has been filed based on grounds arising more than 30 days from the date of EPA approval.

## CONCLUSION

The language and history of Section 110(a)(2) of the Act requires that the Administrator may not approve or promulgate excessively stringent provisions of an implementation plan if such provisions are impossible of attainment because of the unavailability of technology or excessive costs. The decision of the Eighth Circuit, which precludes judicial review of the agency's failure to consider economic and technological factors by the Administrator in his approval of state



plans, and holds that these factors are not relevant, should be reversed.

Respectfully submitted

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